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No. 95-548

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,
v.
DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Where:

(a) a number of plaintiff class members in a class action certified under state rules identical to Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure seek collaterally to attack the settlement of that class action, and

(b) these class members admittedly had contacts with the jurisdiction in which the class action was pending sufficient to have made them joinable as defendants in the action, and

(c) the court in the class action provides a hearing for all members of the class, on first-class mail notice to each class member of the hearing, at which they may appear and put forward any reasons why the class judgment should be set aside or held to be nonbinding, whether based on jurisdictional grounds, procedural due process grounds, or certification under the wrong subsections of Rule 23(b), and

(d) most of the class members make written submissions of their arguments to that court;

is that court's resolution of their procedural due process objections to the class judgment *res judicata* against subsequent collateral attack?

2. May class members who were given first-class-mail notice of a settlement of a class action in a forum which the class members concede had such jurisdiction over them as would have entitled it to join them as defendants, later collaterally attack the settlement judgment for failure to extend them opt-out rights, where the notice of settlement hearing did not expressly offer opt-out rights to class members but (a) the notice did offer class members an opportunity to appear and argue against the form or substance of the settlement, (b) opt-out rights were

available on a discretionary basis under state law to class members who sought to opt out, and (c) the class members did not appear at the settlement hearing, did not object to the form of class certification, and made no requests either for mandatory or discretionary opt-out rights?

PARTIES AND RECORD REFERENCES

The Respondents on whose behalf this brief is filed are Drummond Company, Inc., Drummond Coal Sales, Inc., Elbert A. Drummond, Garry N. Drummond, Joseph E. Nicholls, Jr., Charles W. Adair and the Estate of R. Weaver Self. Neither of the two corporate respondents, Drummond Company, Inc., and Drummond Coal Sales, Inc., has any parent corporation and neither has any subsidiary which has stock outstanding in the hands of the public.

Record references to the Appendices to the brief of Defendants-Appellees (the present Respondents) in the Alabama Supreme Court will be to "Def. Br. App." and to the Appendices to the brief of Plaintiffs-Appellants Martin, *et al.* (now among the Petitioners), in that court will be to "Pf. Br. App.", in each case with the letter or number designation of the particular appendix and, if appropriate, the page thereof. References to pages of the Alabama Circuit Court Clerk's Record are preceded by the letter "C." Deposition transcripts were generally not sequentially page-numbered one after another and in those cases deposition transcripts are cited as "[Deponent name] Tr." and Deposition Exhibits as "[Deponent name] Ex.". References to the Petition for Certiorari filed in this Court are to "Pet." and to its Appendices are to "Pet. App." References to the Appendices to this Brief are to "App."

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BRIEF OF RESPONDENTS IN OPPOSITION

The Respondents, Drummond Company, Inc., and Drummond Coal Sales, Inc. (collectively, "Drummond"), Elbert A. Drummond, Garry N. Drummond, Jr., Joseph E. Nicholls, Jr., Charles W. Adair and the Estate of R. Weaver Self, oppose the grant of certiorari to review the judgment and opinion of the Supreme Court of Alabama in this matter.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Full Faith and Credit Clause, Article IV, § 1, of the United States Constitution, which reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

STATEMENT

The Tender Offer and the Hynson Litigation.—On December 5, 1984, Drummond, the controlling stockholder of Alabama By-Products Corporation ("ABC"), made a Tender Offer to all of the minority shareholders of ABC to acquire any or all of their stock for $75 per share. (Def. Br. App. F at 1) ABC was a publicly-held Delaware corporation whose stock was traded in the over-the-counter market. (Def. Br. App. F at 1, 13) Immediately before the Tender Offer commenced, the bid price for ABC stock was $53.50 per share. (Def. Br. App. F at 14)

The relationship between Drummond and the ABC minority stockholders had been controversial. Various prior efforts by Drummond to acquire the minority interest had been abortive, the most recent being a merger proposed by Drummond in early 1983 at $65 a share. A number of influential Birmingham shareholders of ABC formed a "Stockholders' Protective Committee" ("SPC") to oppose that merger proposal. The SPC circulated to stockholders a report valuing ABC stock at "in excess of $100.00 per share." (Def. Br. App. F at 3-4) ABC's investment banker was unable to render a fairness opinion on the merger proposal and the proposal was terminated. (Def. Br. App. F at 4)

The December 1984 Tender Offer immediately generated controversy also. The SPC quickly issued a circular letter to ABC stockholders reiterating the SPC's valuation of $100 or more and describing the $75 tender price as inadequate. (Def. Br. App. G) Two class actions challenging the Tender Offer were promptly filed by stockholders. One, filed in Federal Court in Birmingham under the Williams Act, was dismissed for lack of standing. The other suit, *Hynson* v. *Drummond Coal Co.* ("*Hynson*"), filed in the Delaware Court of Chancery on January 4, 1985, against Drummond and the directors of ABC, charged them, as controlling stockholder and director fiduciaries, with various breaches of duty. The com-

plaint alleged that the Tender Offer was unfair and coercive and that the Tender Offer Circular was false and misleading. It sought an injunction against the Tender Offer, rescission of it to the extent that it was consummated, an accounting, and damages. (Pf. Br. App. 7)

Tender offers while extended to all stockholders seek individual, not collective, responses by the stockholders. The stockholder response to this one was diverse. Some ABC stockholders tendered none of their shares. Some tendered all of their shares. Others "split" their shares, tendering some and retaining the rest. (Pet. App. 41a-42a) Many of the stockholders were from the Birmingham, Alabama, area; the largest minority stockholder, the Trust Department of Petitioner AmSouth Bank, N.A. ("AmSouth"), made an analysis of the Tender Offer, found that the stock was worth less than the price offered, and after committee action tendered those shares over which it had full discretion. (Goff Tr. 361, 365-66, 489-90) Another large Birmingham bank's trust department reached the opposite conclusion and refused to accept the Tender Offer, except in the case of a few trusts where it permitted the demands of beneficiaries to overrule its judgment. (Roberts Tr. 84, 112-13, 132, 138; Ex. 430)

The Merger and the Neal Case.—No injunction was entered against the Tender Offer, and after extensions, the offer closed in February 1985. As a result of the Tender Offer, Drummond became the owner of a sufficient amount of stock in ABC to give it the power under the Delaware "short form" merger statute to cause ABC to be merged with it without ABC director or other shareholder action. Del. Gen. Corp. Law ("DGCL") § 253, Del. Code Ann. tit. 8, § 253. On August 13, 1985, Drummond caused such a merger, under which the minority stockholders of ABC received $75.60 per share (the $.60 reflected a dividend then due), subject to their individual right to dissent from the merger and demand

an appraisal of the fair market value of their stock in the Delaware Court of Chancery under DGCL § 262. (Lynn Ex. 157) The *Hynson* class plaintiffs amended their complaint to challenge the merger as well as the Tender Offer. (Pf. Br. App. 9 at 20-21)

A substantial amount of the ABC stock did not accept the merger and 189 stockholders, including a number of the AmSouth nondiscretionary trust accounts and many others of the present Petitioners, sought appraisal in the Delaware Chancery Court in a case filed December 3, 1985, styled *Neal* v. *Alabama By-Products Corp.* ("*Neal*"). (Order Amending Judgment in *Neal*, Aug. 21, 1990; C. 104)[1]

The *Hynson* and the *Neal* cases each proceeded in the Delaware court through extensive discovery. Following a hearing on cross-motions for summary judgment before Chancellor Allen in the *Hynson* case in October 1988, efforts were commenced to reach a settlement of *Hynson*. (C. 78; Def. Br. App. I at 1-2) A tentative settlement of the case was finally reached in June 1989, and was documented some months later. (C. 78; Def. Br. App. I at 2) Under the settlement, $5 million was to be paid by or on behalf of the *Hynson* defendants and a class was to be certified to include all the stockholders who tendered in the Tender Offer, all who surrendered their stock in the mergers, and all who sold their stock after the Tender Offer commenced; shares involved in the *Neal* appraisal case were excluded from the class. (Def. Br. App. I at 1-2) The $5 million amounted to about $5 per share, prior to attorneys' fees.

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[1] Mr. Neal, also a Petitioner in this case, had been an officer of ABC, was the largest stockholder of ABC after Drummond and AmSouth, and was a "splitter"; he submitted about half of the approximately 60,000 shares which he and his family owned to be cashed out in the merger and put the remainder in for appraisal in the Chancery Court proceedings. (Neal Tr. 11-13, 21-23, 45-51)

The *Neal* case was tried before a Vice Chancellor in June and July of 1989. The *Neal* petitioners' expert testified to a valuation of $190 a share. The expert for Drummond and ABC testified to a value of $64. The present Petitioners' counsel later well characterized the *Neal* trial as a "swearing match between the experts." (C. 3671) Post-trial briefing was completed by October 1989, and the case stood under advisement for the better part of a year.

Hynson Settled.—In November 1989, Chancellor Allen entered an Order tentatively certifying the *Hynson* class and directing that personal notice of a hearing on the settlement be sent by mail to all class members at their last-known addresses. The class was certified under Delaware Chancery Rules 23(b)(1) and (b)(2), which are textually identical in all material respects to the paragraphs of the Federal Rules of Civil Procedure so numbered. No notice of the availability of opt-out rights was contained in the notice, none being required under those paragraphs, but the Delaware Supreme Court has held that the Court of Chancery has discretion to grant opt-out rights to stockholders in a class action certified under those paragraphs, under which (unlike Rule 23(b)(3) of the Delaware and Federal Rules) opt-out rights are not mandatory, and that this discretion could be exercised even where the notice did not provide for such rights. *Nottingham Partners* v. *Dana,* 564 A.2d 1089, 1101 n.28 (Del. 1989). The notice indicated that there would be a hearing on February 1, 1990, at which consistent with established Delaware practice in class actions any stockholder could appear and object to the settlement or to the class certification. (Def. Br. App. I at 3) The notice warned that an order barring claims against Drummond and the individual defendants relating to the Tender Offer and the subsequent merger would be entered if the court approved the settlement. (*Id.* at 2) A W-9 Form was provided with the notice to be com-

pleted, signed and returned to a Settlement Administrator appointed by the court so that stockholders would not have federal withholding taxes taken out of their settlement moneys. (*Id.* at 3)

No class member whatsoever appeared at the February 1, 1990, settlement hearing before Chancellor Allen to object in any way to the form or substance of the settlement or to seek discretionary opt-out rights. Accordingly Chancellor Allen that day entered a Final Judgment certifying the class, approving the settlement and barring claims by the class members as indicated above. (Def. Br. App. J)

Both before and after the February 1, 1990, Final Judgment, most of the present Petitioners filed their W-9 Forms with the Settlement Administrator. (Pet. App. 42a) Some of the Petitioners and others filed change of address notices with the Settlement Administrator. The Trust Department of AmSouth Bank prior to February 1, 1990, studied the notice of proposed settlement, obtained advice of counsel and committee approval of its participation in the settlement, and filed a vast amount of paperwork to obtain the settlement proceeds for its trust accounts. These included 83 sworn proofs of claim which it drafted itself, although generally speaking sworn proofs of claim were not required except from a narrow subclass not pertinent to AmSouth. (K. Smith Tr. 59-65; Exs. 1598 to 1683)

The Neal Decision and the Alabama Actions.—On August 1, 1990, the Vice Chancellor in the *Neal* case entered his judgment and opinion generally agreeing with the *Neal* petitioners' expert and accordingly valuing the entirety of ABC as of August 13, 1985, under DGCL § 262, at $180.67 per common share. (Pf. Br. App. 12) Many of the present Petitioners continued thereafter to file W-9 Forms with the *Hynson* Settlement Administrator or to write letters to the Administrator inquiring after their settlement proceeds, notwithstanding the immediate

extensive publicity given the August 1, 1990, *Neal* decision in the Birmingham press. *See, e.g.*, Wrinkle Tr. 83-85, 90; Goff Tr. 454-58, Goff Ex. 393.

In January 1991, an action was filed by John H. Martin, a former ABC stockholder ("*Martin*"), in Alabama Circuit Court at Birmingham. The suit sought only damages, compensatory and punitive, but otherwise made essentially the same allegations as had been made in the *Hynson* litigation. The defendants were Drummond and certain of the ABC directors at the time of the Tender Offer. The complaint's theory as to the effect of the *Hynson* Final Judgment was that it was void because the settlement notice did not expressly extend opt-out rights to the class members. (C. 26, 34-35, 43)

Commencing in March 1991, additional plaintiffs, apparently attracted by the $180.67 award in *Neal,* joined in the *Martin* action and in May 1991 two additional lawsuits were filed by other law firms, making allegations similar to those in the *Martin* action (all collectively, the "Alabama Actions").[2] All in all, approximately 500 plaintiffs (including the approximately 100 trust accounts sued for by AmSouth) joined as plaintiffs in the Alabama Actions. These were not, and did not purport to be, class actions. The Respondents denied the material allegations of the complaints and interposed various affirmative defenses, including *res judicata,* release, laches, waiver, accord and satisfaction and the Full Faith and Credit Clause of the United States Constitution. (C. 60, 1803-04)

Proceedings in the Spring of 1991 in Hynson; Chancellor Allen's Decision.—On April 25, 1991, on motion by the defendants under Delaware Chancery Rules 23 and 60(b)(3) in the *Hynson* action, the Delaware Court of Chancery scheduled a hearing to be held on June 7,

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[2] One such action was the "*Durkee*" action, named after its lead plaintiff. (C. 1755) The other was filed on behalf of AmSouth for its trust accounts. (C. 1708)

1991, at which any matter concerning the February 1, 1990, Final Judgment could be raised and heard. (App. 29a-31a) This expressly included the absence of a formal offer of opt-out rights; the propriety of the class certification under Delaware Rules 23(b)(1) and (b)(2); and the consistency of the Final Judgment with the requirements of due process. Individual notice of the hearing and the matters to be considered was given by mail to all class members, including the present Petitioners, on May 2, 1991. (*Id.*)

Responding to that notice, the present Petitioners (apart from AmSouth) through their counsel filed briefs with the Delaware Court of Chancery. The Petitioners in the *Durkee* action filed a 13-page opening statement and later a 4-page statement responding to a brief filed by the Respondents. The Petitioners in the *Martin* action filed a statement consisting essentially of a 30-page brief which they had filed in the Alabama Circuit Court. These submissions were considered by the Delaware Court (App. 26a), although a formal appearance by the Petitioners was not entered, despite a full opportunity to appear.

Following the June 7, 1991, hearing at which counsel for the plaintiff class in *Hynson* and counsel for the Respondents appeared and presented oral argument, Chancellor Allen isued an opinion on June 14, 1991. *Hynson* v. *Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991).[3] The opinion dealt with two principal issues: *First*, did the Delaware court have jurisdiction over the class members sufficient to adjudicate in a binding fashion the dispute tendered to it by the filing of the class Complaint in the *Hynson* case. *Second*, was the class properly certified under Delaware Chancery Rules 23(b)(1) and (b)(2)

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[3] We attach Chancellor Allen's opinion as Appendix A, his Order entered on that opinion as Appendix B, and the Notice of the hearing in question as Appendix C hereto.

and was any formal offer of opt-out rights required under those rules or as a matter of due process.

As to the first issue, the opinion defined the "central question" raised as "whether a single jurisdiction with *in personam* jurisdiction over the corporation and all of its directors may, in a single action, conclusively adjudicate whether a corporation's directors have satisfied their fiduciary duties to the corporation and its shareholders in the context of a corporate merger or other corporate transaction." (App. 3a; footnote omitted) This question was answered "yes." The opinion held that buying stock in a Delaware corporation was a sufficient nexus with that jurisdiction "to render it consistent with traditional notions of fairness to bind the holder of that stock as a plaintiff to adjudications *concerning the corporate rights that attach to that stock,* including the equitable right to require directors to act with loyalty to the corporation and to its shareholders." (App. 19a; emphasis in original) On this basis, citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (App. 12a), the Chancellor found the exercise of jurisdiction over the class to be consistent with the Due Process Clause. The Chancellor's order indicated that other bases of the *Hynson* court's jurisdiction asserted by the Respondents were not being rejected, but that the court chose to rest its decision on the basis stated. (App. 28a)

The Chancellor also analyzed the second question, whether it was consistent with the Due Process Clause and the Delaware Chancery Rules, textually identical in this regard to the Federal Rules of Civil Procedure, that the *Hynson* class had been certified without a formal offer of opt-out rights. Here, the Chancellor cited the cohesive and homogenous nature of the stockholder class. He observed that whatever remedy might be available to the shareholders for the claimed breach of fiduciary duty by the controlling stockholder and the directors, whether injunction, rescission, or money damages, would

"be determined by reference to the effects of the fiduciary's wrong on the trust or on the corporation or all of its stockholders as a class. Remedy in such an action will not entail individual matters [as to particular stockholders]." (App. 12a) The Chancellor observed that there might be available "rescission, payment of 'damages' to raise the price paid to an 'intrinsically fair' price, or constructive trust—but in each case the peculiarities of any holder would have no bearing on the appropriate remedy." (*Id.*) After analysis, and finding that the alleged wrongs done to the class did not have "important individual (not class-based) aspects" (App. 20a), the Chancellor concluded:

> Thus, considering the language of Rule 23 and the requirements of the United States Constitution I conclude that this action was properly certified as a class action under Rule 23(b)(1)(A) and (b)(2).

(*Id.*) The Chancellor thus held, and his order confirmed (App. 27a ¶¶ 2 & 3), that no formal offer of opt-out rights was required under those rules or under the Due Process Clause.[4] No appeal was taken from the Chancellor's opinion and order.

The Alabama Actions Proceed.—Notwithstanding the decision of the Delaware court, the Petitioners chose to continue the Alabama Actions. After extensive discovery, cross-motions for summary judgment were filed, and the Alabama Circuit Court, in an order and opinion dated September 2, 1993, granted the Respondents' motions and dismissed the Alabama Actions. The dismissal was both on the basis of *res judicata* and on the basis that there was no substantial evidence of fraud sufficient to take the case to a jury. (Pet. App. 53a-54a) As to the first point, the court held that the Delaware Chancery Court had jurisdiction over the Petitioners in the *Hynson* case

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[4] Certain claims contained in the Complaint in the *Martin* action that the settlement and/or the court's approval of it had been procured by fraud were dismissed as baseless. (App. 20a-22a)

and that the exercise of that jurisdiction, for reasons similar to those given by Chancellor Allen, did not conflict with this Court's decisions on the requirements of due process in connection with class action litigation. (*Id.* at 53a-54a) Moreover, the court held that if the *Hynson* judgment was not binding on the Petitioners (due to a lack of jurisdiction over them), the Alabama statute of limitations barred the Alabama Actions. (*Id.*)[5]

The Alabama Supreme Court's Decision.—The Petitioners appealed to the Alabama Supreme Court, which unanimously affirmed the judgment of the Circuit Court. The Supreme Court, while expressing appreciation for Chancellor Allen's efforts to resolve the dispute in his June 14, 1991, opinion and subsequent order, did not accept (although it did not reject) his reasoning that the holding of stock in ABC on the part of the class members was by itself a sufficient nexus to provide the Delaware court with jurisdiction to determine disputes as to the rights of all those holders of stock against corporate fiduciaries. (*Id.* at 36a-45a) However, the court held that nonetheless the Final Judgment in *Hynson* was binding upon the Petitioners, inasmuch as the offer of formal opt-out rights spoken of in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), was required only "when the plaintiff class members do not have such contracts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant." (Pet. App. 32a) The Court then, summarizing its decision, held that:

> The plaintiffs have such contacts here, consisting of: their ownership of stock in a Delaware corporation; the fact that *Hynson* concerned the value of that stock; and their participation in *Hynson*, indicating submission to the Delaware court's jurisdiction. Furthermore, they received all of the due process components required by *Shutts*—notice, an oppor-

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[5] See n.8, p. 14, below.

> tunity to be heard, the best practicable notice, a description of the action and their rights in it, and adequate representation—lacking only an express right to opt out. The Delaware Supreme Court, however, had provided, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), a discretionary right to opt out even in class actions that did not give an absolute right to opt out, and none of these plaintiffs objected to the failure to give a right to opt out or requested the *Hynson* court to allow them, within its discretion, to opt out. For all these reasons, the plaintiffs should not now be allowed to collaterally attack the *Hynson* judgment.

(*Id.* at 32a-33a)

While unable to say one way or another whether Chancellor Allen's view of the jurisdictional effect of holding stock in a Delaware corporation in a case involving the claims made in *Hynson* was consistent with this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) (Pet. App. 39a-40a), the court held that since most, if not all, of the Petitioners had additional contacts with Delaware, those contacts plus the stock ownership would have been enough to establish Delaware's jurisdiction over them as defendants, and hence, clearly as plaintiff class members. (*Id.* at 40a-42a, 45a-46a) These contacts included participation as Plaintiffs in the *Neal* action—the "splitters" who "purposefully availed themselves of the benefit of the law of Delaware" by invoking the judicial appraisal procedure; the filing of proofs of claim in *Hynson* (primarily AmSouth) which was "significant as showing an intent to submit to the jurisdiction of the *Hynson* court" and the Petitioners' almost universal submission of W-9 forms, which "expressed an interest in receiving proceeds from the *Hynson* settlement." (Id. at 42a) The court noted that instead of requesting discretionary exclusion from the class under the *Nottingham Partners* case, most of the Petitioners "affirmatively indicated their willingness to participate in the *Hynson* settlement." (*Id.* at 44a) The court

held that the procedures in the Delaware court did not fall so far short of insuring the protection of the interests of the absent class members as to make it unnecessary for them to request in the Delaware court that they be excluded from the action. (*Id.*) The court, in conclusion, observed that the Petitioners who had "sufficient contacts with Delaware in connection with the *Hynson* proceedings", meaning contacts in addition to stock ownership, "are barred from relitigating the claims settled in *Hynson*." (*Id.* at 45a)

The court observed that "[t]his answers the claims of most of the plaintiffs, and it may answer the claims of all plaintiffs." (*Id.* at 45a-46a) The court considered remanding the case "for individualized findings as to any plaintiffs who may not have established any contacts with Delaware other than the holding of ABC stock"; but the court rejected this approach, noting that "constitutional rights may be waived if not timely asserted." (*Id.* at 46a) The court held that a waiver had occurred in view of the notice that all class members received of the proposed binding settlement; the existence of colorable jurisdiction over the absent class members, given their stockholdings in ABC; the availability of discretionary opt-out rights under *Nottingham Partners* for Rule 23(b)(1) and (b)(2) classes in Delaware; and the absence of any objection by any class member to the settlement or any expressed interest on their part in exclusion until long after the settlement. Accordingly, under the doctrine of waiver, the court held that any Petitioner in that category was barred as well. (*Id.* at 48a)[6] Before this Court, the Petitioners all take the position that indeed they did have sufficient contacts with the State of Delaware to have

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[6] The Respondents had urged the doctrines of waiver and laches to the Alabama Supreme Court as one of a number of grounds of affirmance. (Def. Br. 135-37)

permitted its courts to exercise jurisdiction over them as defendants.[7]

REASONS FOR DENYING THE WRIT

The Petitioners have all accepted the determination of the Alabama Supreme Court to the effect that they had sufficient contacts with the State of Delaware under the doctrine of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) ("*International Shoe*"), so that they could have been made *defendants* in the *Hynson* case in the Delaware courts. Nonetheless, Petitioners claim that the judgment of the Delaware court in the *Hynson* case is void as to each of them because they were not given a formal opportunity to "opt out" of the case at the time that it was in the process of settlement. They claim that procedural due process ensures their right to "opt out" even though the Delaware court had jurisdiction over them. They accordingly claim the right to pursue the Alabama Actions commenced six years after the alleged wrongs to them.[8]

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[7] The Alabama Supreme Court did not discuss the Circuit Court's alternative ground for granting summary judgment, the absence of any evidence of fraud sufficient to go to a jury.

[8] The Petitioners had a statute of limitations problem in the Alabama courts. See n.5, p. 11 above and Pet. App. 53a. The pertinent statute of limitations was two years. Ala. Code § 6-2-38(l) (Supp. 1990). While alleging nonaccrual through fraudulent concealment, they were unable to effectively show nonaccrual through such concealment since their claims included claims that the Tender Offer Circular was coercive, and coercion concealed from its victim is hardly coercive; and as to the alleged "fraud", the SPC immediately called to the attention of stockholders most of what was later claimed to be fraud, the expert evidence of valuation relied on by the Petitioners in the *Neal* case was made known to a number of the Petitioners years before the present action, and the 1985 complaint in the *Hynson* case itself made allegations similar to those later made in the Alabama Actions in 1991. Thus, the pendency of the *Hynson* action had to be relied on in order to allege a tolling of the statute of limitations. But under Alabama law only proceedings in a court with jurisdiction can toll the stat-

Petitioners claim this right although the Delaware court, which admittedly had jurisdiction over them—jurisdiction based on contacts extensive enough so that they could have been made defendants (Pet. App. 32a)—twice gave them, by first-class mail, notice of hearings at which they could have asserted (and in one case did assert) the same rights to opt out that they now urge before this Court that they were denied.

The first of these notices, given in November 1989, was for a hearing on February 1, 1990, at which objections to the form of class certification—without formal opt-out rights, under Rule 23(b)(1) and Rule 23(b)(2)—could have been made, and where requests for opt-out rights under the *Nottingham Partners*[9] case would have been entertained. The Petitioners, apparently satisfied with the settlement, and being occupied then and thereafter in filing proofs of claim and W-9 Forms with the Settlement Administrator and in otherwise trying to get their *Hynson* settlement moneys, made no objection at all and did not seek to participate in the hearing.

The second notice, given on May 2, 1991, was for a hearing before the Delaware court on June 7, 1991. That hearing was to determine, among other things, whether the class certification without opt-out rights effected sixteen months before had been consistent with procedural due process. (App. 29a-31a) Full participation at the hearing to the same extent as if a named

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ute of limitations. *See, e.g., Freer* v. *Potter*, 413 So.2d 1079, 1082 (Ala. 1982). The Petitioners accordingly made concessions below as to the existence of jurisdiction in the *Hynson* court, after at first having denied its jurisdiction. Apparently since these concessions may not have been as clear as those now made, the Alabama Supreme Court did not rely on them in its opinion, finding, in addition to the holding of stock in a Delaware corporation, other contacts with Delaware sufficient to support jurisdiction over the Petitioners under *International Shoe* if they had been defendants. (Pet. App. 32a)

[9] See the discussion at pages 5, 13, above.

party to the case was made available to each class member. The Petitioners received this notice and all of them, except AmSouth, through their counsel furnished briefs to the Delaware court to assist it in resolving the issues which the hearing had been called to determine. The Delaware court determined both (a) that it had jurisdiction, consistent with territorial due process, over the Petitioners in the *Hynson* case [10] and (b) that their procedural due process rights were not violated by the failure expressly to offer opt-out rights in the notice of the February 1, 1990, settlement hearing. That decision was not appealed and is *res judicata.* It is accordingly inappropriate to treat this case as one in which any alleged conflict between the circuits as to the meaning of *Shutts* can be resolved. The availability of discretionary opt-out rights in this case, and the failure of the Petitioners to seek them, also makes it inappropriate to treat this case as one in which the resolution of any alleged conflict of the circuits could be effected.

Accordingly, the conflict of circuits tendered by the Petitioners could not appropriately be resolved in this case, even assuming that it existed.

In fact, that conflict does not exist. There is an extensive line of cases treating this Court's decision in *Shutts* as viewing opt-out rights as a method of establishing jurisdiction over plaintiff class members. The Ninth Circuit's opinion in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994) ("*Ticor*"), the one allegedly contrary case cited by the Petitioners, does not enunciate the proposition ascribed to it by Petitioners. The result below is also supported by the clear correctness of the numerous decisions taking the opposite view from the view of the Petitioners and the view which they ascribe to the Ninth Circuit's decision in *Ticor*. Finally, the alleged procedural embarrassments, said by Petitioners to be caused by the rule set forth in

[10] A conclusion now accepted by Petitioners.

the decision below and decisions by three Federal Courts of Appeals, are nonexistent.

1. *The Issue Tendered by Petitioners Is Itself Barred by Res Judicata.*—It is black-letter law that the jurisdiction of a court to hold proceedings validly affecting a person's rights against his or her will is dependent on the existence of three factors: (1) the presence of sufficient contacts between the jurisdiction which established the court and that person; (2) the giving of fair notice of the proceedings to that person; and (3) the provision to that person of a right to appear and be heard at the proceeding. *Restatement (Second) of Conflict of Laws* ("*Restatement*") §§ 92(a) and (b) (1971).[11] Factor (1) was found to exist by the Alabama Supreme Court and the Petitioners all concede it here. There is no dispute that the Petitioners received first-class mail notice of both the February 1, 1990, and June 7, 1991, hearings in the Delaware Chancery Court, and that each of them had an opportunity to appear and be heard at each of those hearings (and, although hardly necessary, that most of the Petitioners took advantage of that opportunity with respect to the June 7, 1991, hearing by filing substantial briefs). It could be argued that the outcome of the February 1, 1990, hearing, given the existence of the three jurisdictional factors, is conclusive on the Petitioners' rights. But certainly the actual, considered, and express adjudication in June 1991 by Chancellor Allen not only of the court's jurisdiction, but also of the issue whether the Petitioners' procedural due process rights had been violated, is conclusive on the Petitioners.[12]

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[11] Subsections (a) and (b) of § 92 relate to jurisdiction over the person; subsections (c) and (d) to "subject matter" jurisdiction, never in issue in this case. The other black-letter side of the coin is found in § 104: "A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states."

[12] See the discussion at pages 9-10, above, and App. 20a for the Delaware court's express resolution of this issue.

The Petitioners say that this Court's decision in the *Shutts* case as to the necessity of granting opt-out rights in certain class action cases does not turn on the extension of those rights as being a method of obtaining jurisdiction—although the *Shutts* opinion uses the word "jurisdiction" in this context 19 times—but that it is a requirement of procedural due process even in the presence of jurisdiction. They say, in effect, that the Delaware court would have to have afforded the class members an opt-out right if they were all residents of Wilmington and lived within walking distance of the courthouse. But the Delaware court decided differently at the June 1991 hearing. Given the existence of jurisdiction, given the first-class mail notice to all the class members, and given their fair opportunity to be heard before it as parties on the issues—even putting to one side the fact that all but one of the Petitioners filed substantial briefs with the Delaware court—the Delaware court's resolution in June 1991 of the issue of whether the failure to grant formal opt-out rights in its February 1, 1990, order violated procedural due process is conclusive, right or wrong. It is *res judicata* and entitled to full faith and credit in the Alabama proceedings.[13] The fact that the Petitioners never entered a formal appearance in the Delaware court (Pet. 4) is irrelevant; the court had jurisdiction over them and gave them notice and the right and opportunity to be heard.

Once a court with jurisdiction over parties has expressly adjudicated a matter concerning their rights, even constitutional rights, the matter is *res judicata* and cannot be collaterally examined. The Full Faith and Credit Clause demands that in a case, such as this, involving state courts. *Riley* v. *New York Trust Co.*, 315 U.S.

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[13] Chancellor Allen thus resolved the contention underlying the Petitioners' arguments, namely, that *Shutts* required, as a matter of procedural due process, opt-out rights in the *Hynson* case. He held "no."

343, 348-49 (1942); *Durffee* v. *Duke*, 375 U.S. 106, 109 (1963); *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982); *Restatement* § 93 (1988 Revisions). State courts as well as federal courts have the power to determine whether federal Constitutional rights have been infringed, and at least in civil cases their determinations, assuming jurisdiction over the parties, are conclusive, subject only to direct review by this Court; those determinations may not be attacked collaterally. *See Angel* v. *Bullington*, 330 U.S. 183, 188-90 (1947); *Montana* v. *United States*, 440 U.S. 147, 156-58 (1979). An assertion of error by the rendering court is not a basis for collateral attack. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 709 n.16; *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940); *Restatement* § 106.

Given the admitted jurisdiction of the Delaware court over the Petitioners—jurisdiction sufficient even to join and bind them as defendants—the Delaware court's adjudication of whether its earlier order violated their procedural rights under the Due Process Clause must be binding on them, right or wrong. Their appropriate, and only forum accordingly for the argument of "opt-out rights as procedural due process" which they now try to bring before this Court was to appear in June 1991 in the Delaware Chancery Court, appeal to the Delaware Supreme Court,[14] and, if dissatisfied with the result there, seek this Court's direct review.[15]

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[14] A class member has such a right of appeal in Delaware. *See e.g., Polk* v. *Good*, 507 A.2d 531, 533 (Del. 1986); *Pinkert* v. *Wion*, 431 A.2d 1269, 1270 (Del. 1981).

[15] Petitioners claim that this case does not present the circumstances that caused this Court to dismiss the petition for certiorari in *Ticor*. (Pet. 8-10) In fact, it presents more compelling circumstances. In *Ticor*, *res judicata* precluded the Court from having before it a preliminary issue which might have affected the grounds of the Court's decision; the majority of the Court thus declined to answer what was held to be a potentially hypothetical Constitu-

2. *Additional Grounds Prevent Review of the Issue Tendered by the Petitioners.*—The Petitioners do not contest the holding of the Alabama Supreme Court that under Delaware law, if any of the Petitioners had chosen to show up at the February 1, 1990, hearing and to request to opt out of the settlement, the Delaware Court of Chancery had the power and discretion to grant that request under *Nottingham Partners*. This factor in and of itself, given the admitted existence of jurisdiction in the Delaware court, and given the fact that the Petitioners instead of considering how to distance themselves from the *Hynson* settlement were then actively engaged in trying to claim the benefits of it, negates any contention of violation of procedural due process in any way other than as an abstraction. Moreover, as the Alabama Supreme Court held, again in a ruling not challenged in this Court, a constitutional right, even if existent, can be waived (Pet. App. 46a); and by their failure both to object to the form of class certification at the February 1, 1990, hearing and to request discretionary opt-out rights there, and by seeking to obtain the fruits of the *Hynson* settlement, the Petitioners waived any rights which they might have had. (*Id.* at 47a-48a) These holdings of the Alabama Supreme Court, not challenged in the Petition, stand as blocks to the consideration of the abstract issue tendered by the Petitioners.

3. *The Asserted Conflict of Circuits Does Not Exist.*—Petitioners claim that there is a conflict of circuits. They urge that the Ninth Circuit, in *Ticor*, held that in certain class action cases, a class member may collaterally attack a class judgment or settlement even if he or she was subject to the personal jurisdiction of the class court as if a defendant under *International Shoe* if opt-out rights are not provided, while the Second, Third and Eighth Cir-

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tional question. *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1360 (1994). Here *res judicata* prevents the Court from reaching the tendered issue at all.

cuits hold to the contrary. *In re Drexell Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *White* v. *National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). But while the Petitioners are correct as to the positions of the Second, Third and Eighth Circuits, they are not correct as to the position of the Ninth Circuit. The Ninth Circuit opinion in *Ticor* may be read from beginning to end without encountering any observation by the court that the parties seeking collaterally to attack the judgment rendered by the District Court in Philadelphia were subject to the jurisdiction of that court under *International Shoe* principles, or any discussion of the implications of the existence of such jurisdiction.

Thus, as the briefs in this Court in *Ticor* demonstrate, it is impossible to say whether the "due process" referred to in the *Ticor* court's opinion (982 F.2d at 391) had to do with the limits on exercise of judicial jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment [16] or with the procedural protections afforded by that Clause.[17] Indeed, the argument of the prevailing party in the Ninth Circuit in *Ticor* was, in fact, based clearly and squarely on *territorial* due process:

> The Supreme Court has found that an opportunity to opt out is *constitutionally* required to obtain personal jurisdiction over absent class members from outside the forum state in the context of claims for

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[16] The main federally-enforced limitation on the territorial jurisdiction of State courts is the Due Process Clause. See *International Shoe*, 326 U.S. at 316-17.

[17] Counsel were in disagreement on the issue as to what the Ninth Circuit meant, and sometimes proceeded to argue on both assumptions. Petition for Certiorari, filed June 15, 1993, No. 92-1988, at 9-10; Brief for Petitioners, filed Nov. 16, 1993, at 11 (both assumptions), 17 (territorial); Brief for Respondents, filed Dec. 13, 1993, at 6-7.

> monetary damages . . . . In addition, plaintiffs' [the parties writing the brief] argument only applies with regard to class members from outside the forum state, over whom the court has no personal jurisdiction other than through the effect of class certification. Where personal jurisdiction is otherwise properly asserted by the Court, the Supreme Court's holding in *Shutts* is irrelevant.

Reply Brief for Plaintiffs-Appellants, *Brown* v. *Ticor Title Insurance Co.*, 9th Cir., No. 91-15474, filed October 1991, at 3-4 (emphasis in original). One must presume that the court accepted the argument that prevailing counsel made, not a broader argument that he chose not to make. Indeed, in this Court, the parties defending the Ninth Circuit's holding in *Ticor* pointed out without contradiction that their clients never received notice of the class action or its settlement—and a failure to give notice would negate jurisdiction—and the issue of the territorial jurisdiction of the rendering court was also a subject of argument.[18]

The Ninth Circuit's opinion in *Ticor*, accordingly, cannot be read as establishing any precedent contrary to the

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[18] For the failure to give notice, see Brief of Respondents in Opposition to Certiorari, filed July 19, 1993, No. 92-1988, at 6 ("he [the absent plaintiff] received no notice of the lawsuit . . . did not know who the lawyers were, and was not told about the settlement.").

The court rendering the judgment attacked in *Ticor* was a federal court and while Congress could give all federal courts general jurisdiction running throughout the United States, with some exceptions it never has. Generally speaking, the territorial jurisdiction of the federal courts is confined to that of the respective states in which they sit. *See* Fed. R. Civ. P. 4(e). A question argued in *Ticor* was the extent to which the nationwide service on defendants available in antitrust cases (as *Ticor* was), afforded jurisdiction over out-of-state class members and whether the limitation on jurisdiction applied to involuntary plaintiffs as well as defendants. Petition for Certiorari filed June 15, 1993, No. 92-1988, at 20-22; Brief for Petitioners, filed Nov. 16, 1993, at 12-16.

consistent holdings of the other Courts of Appeals which have expressly held that contacts sufficient to support personal jurisdiction under the *International Shoe* doctrine obviate the need to offer opt-out rights as a matter of constitutional law, although, to be sure, opt-out rights must be granted wherever the Federal Rules (or similar rules under state law) provide for them, as in a case under Rule 23(b)(3). *See Ticor*, 114 S. Ct. at 1361.

The decisions of the Second, Third and Eighth Circuits are, in any event, clearly correct and do not contradict this Court's ruling in *Shutts*. This Court used the word "jurisdiction" 19 times in its opinion in *Shutts* to identify the particular aspect of due process—the requirement of territorial or jurisdictional due process described in *International Shoe*—that was before the Court. The class members in *Shutts* lived in all 50 States and abroad and only a few had any connections with Kansas (472 U.S. at 799, 801, 814-15), the state in whose courts the judgment in question had been rendered. This Court identified the petitioners' claim in *Shutts* as being one that

> Kansas courts *may exercise jurisdiction* over these plaintiffs *only if the plaintiffs possess the sufficient "minimum contacts"* with Kansas as that term is used in cases involving personal jurisdiction ove out-of-state defendants. [Citing *International Shoe* and other cases.] Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its *jurisdictional reach* and thereby violated the due process rights of the absent plaintiffs.

Id. at 806 (emphasis supplied).

This Court held that offering an option to opt out of a class, at least in certain cases, was all that was required in order to obtain jurisdiction over the plaintiff class members who did not otherwise have sufficient contacts with the state or had affirmatively consented to its jurisdiction, given the difference in interests between adjudicating the

rights of a defendant and of a potential plaintiff.[19] *Id.* at 807-12. In cases where jurisdiction is supported on some other basis, opt-out rights are not constitutionally required, although they are required in the interests of procedural fairness, by rule in the Federal Rules and in the great majority of state rules which follow them, in actions of the sort described in Rule 23(b)(3) where the interests of the class members may not be cohesive. *Id.* at 813 n.5.

Once the threefold requirements for the exercise of judicial jurisdiction over a defendant—sufficient contacts, notice, and an opportunity to be heard—are present, a defendant in a civil case would have no Constitutional rights to "opt out" because he would prefer to be sued in another forum. Similarly, the Federal Rules have long contemplated that persons "whose joinder will not deprive the court of jurisdiction over the subject matter" and who are "subject to service of process" by the court may be joined, despite their refusal to participate in an action, as "involuntary plaintiffs"; no provision for opt-out rights for these analogs of absent class members is made. Fed. R. Civ. P. 19(a) (first adopted in substantially its present form effective July 1, 1966). To accept the more expansive view ascribed (without basis) to the Ninth Circuit by the Petitioners, that class members who are subject to a court's jurisdiction based on the existence of sufficient contacts under *International Shoe* and who have received notice of and been afforded an opportunity to participate in a proceeding, but do not deign to do so, may later collaterally attack the result of that proceeding if they don't like it, is to weaken the necessary finality of judicial proceedings and to lead to more cases like the present one, in which the present Petition-

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[19] The issue of "procedural" rather than "territorial" due process was not raised below in *Shutts*, *see* 472 U.S. at 802, and hence was not before this Court.

ers approach this Court close to eleven years after the alleged wrongs of which they complain.

4. *The Parade of Horribles Envisioned by the Petitioners Will Not Take Place.*—The Petitioners claim that if this Court does not adopt a rule that class members having sufficient contacts with a jurisdiction rendering a class judgment, who have been afforded personal notice and an opportunity to participate, may nonetheless later attack the proceedings collaterally, it may be necessary at "the commencement of any class action" to have "discovery on an individual basis . . . to determine which of potentially hundreds or thousands of absent class members have minimum contacts with the forum." (Pet. 13) Why this would be so is not explained. Nor is it explained why this phenomenon of widespread *in limine* discovery of class members for their contacts with the forum has not been seen in class actions in the Second, Third and Eighth Circuits, where a rule contrary to that which the Petitioners advocate to this Court has been the law for several years. The question of jurisdiction in the rendering court is one which is habitually taken up, and must be taken up, when a collateral attack is later mounted; the subject of *International Shoe* contacts by each class member is never taken up "at the commencement of any class action," and there is no need to do so.

As to the practical importance of the tendered issue, we note that the present case is unusual in that there was a determination by the court in the forum where the collateral attack was mounted that all 500 of the plaintiffs had, or were likely to have had, sufficient contacts with the rendering court so that they could have been joined as defendants there. This was followed by the acceptance of that determination by all 500 of the parties who were attempting the collateral attack. But in the usual case of a large class, such as a consumer product tort case, a nationwide price-fixing case, or the like, it may be expected that most class members will have no *Inter-*

national Shoe-type contacts with the jurisdiction in which the class court sits. In all cases of certification of class actions, it is in the interest of the class representatives, and, at least where a settlement is negotiated, it is in the interest of the defendants, to see to it that the determination or judgment entered on settlement is as broadly binding on the class as possible. *See Shutts*, 472 U.S. at 805-06. Thus, as a practical matter, the issue raised by the Petitioners, even if it was a live one, is not of great practical importance; at least one side in the original class action, and possibly both sides, would have an interest in following such procedures as would validly bind to the result, against collateral attack, not only those class members who might have *International Shoe* contacts with the forum but those who do not.

To say that a rule which diminishes the category of class members who may bring a collateral attack on class action judgments "will inevitably lead to uncertainty in class settlements" and prevent "finality" (Pet. 13) is to turn matters on their heads. A rule which encourages class members dissatisfied with a class settlement or with their class counsel to come forward and object in the class court, to seek opt-out rights there if not expressly afforded, and to take a direct appeal if they believe their rights under the Constitution, pertinent statutes, and court rules have been infringed, is a rule that reduces "uncertainty" and produces "finality." That rule is the rule of the Second, Third and Eighth Circuits and of the court below.

Most of the cases which have allowed class settlements to be set aside or which have ordered the provision of opt-out rights not initially provided for involve direct applications in the class court and if necessary appeals from its judgment. That procedure is available in Delaware, *see Nottingham Partners*, 564 A.2d at 1093-94; in New York, *see In the Matter of Colt Industries Shareholder Litigation*, 566 N.E.2d 1160, 1161-63 (N.Y. 1991); and in the fed-

eral courts and in other state jurisdictions. *See e.g., Jefferson* v. *H.K. Porter Co.*, 485 F. Supp. 356, 357- 58 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir 1981); *In re Kroger Co. Shareholder Litigation*, 590 N.E.2d 391, 394-95 (Ohio App. 1st Dist. 1990). The rule tendered by Petitioners to the contrary expands collateral attack and encourages the taking of multiple bites at the apple. The Petitioners' rule is one which enlarges the category of class members who can collaterally attack a class judgment, which will promote uncertainty, prevent finality, and lead to efforts, like the present one, which seeks to permit the Petitioners who were admittedly subject to the jurisdiction of the Delaware courts to relitigate a case filed in those courts close to eleven years ago.

* * * *

There is no conflict of holdings in the Circuits and the rule concerning the effect of the existence of "jurisdiction as over a defendant" identified by Petitioners as the majority rule is in fact the general rule and is correct. The decision below is in accordance with that rule. But no issue as to that rule's correctness is presented by this case, given the *res judicata* effect that must be afforded Chancellor Allen's resolution at the June 1991 hearing of the procedural due process issues now raised by the Petitioners, and the other factors discussed above.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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